Filed 12/02/04 Marriage of Warday CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DANIELLE and GUY WARDAY.	
DANIELLE WARDAY, Respondent, v. GUY WARDAY, Appellant.	G033215 (Super. Ct. No. 01D000584) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Linda Lancet Miller, Judge. Affirmed.

Brian G. Saylin for Appellant.

Gerold G. Williams for Respondent.

Guy Warday (father) appeals from an order denying his request to modify the child custody and visitation order granting Danielle Warday (mother) primary physical custody of their now six-year-old daughter. The court denied the request after finding that the prior custody order was final and that father failed to meet his burden to show that changed circumstances warranted modifying the order. Father contends the court erred in making these findings. We disagree and affirm the order.

FACTS

In May 2002, the court issued an order awarding the parties joint legal custody of the child and awarding primary physical custody to mother. In a partial statement of decision, the court stated it found the parties' inability to "effectively and consistently communicate with each other concerning the welfare and best interests of their minor child . . . is detrimental to this child." The court further found mother "has been, and is, the primary caretaker of the minor child," and that this designation was "in the best interests of the child in the sense that [it] is the least detrimental alternative for this child."

In July 2003, father filed an order to show cause for modification of the child custody order. To show changed circumstances, father declared: "The court, at the time of it's [*sic*] custody order, informed us that one of the reasons for denying a joint physical custody arrangement was that we lived so far apart. Accordingly, I have now moved . . . so that we live in close proximity. Our daughter is now to commence kindergarten and should be close to both of our residences and the custody arrangement should be adjusted to accommodate the commencement of school. In this regard, I am able to take our daughter to school and pick her up . . . since I am self employed and can determine my work schedule . . . . [¶] Since our separation, I have had a stable

environment . . . . Petitioner has had 3 to 5 boyfriends over this period, roommates that have lived in and then moved out and had three different jobs."

In her responsive declaration, mother pointed out that the court had denied joint physical custody because of the parties' inability to effectively communicate and that this situation had not improved. She also denied the allegation that she had numerous boyfriends or roommates.

The court found that father's declaration was "insufficient to set forth a change of circumstances," but granted his request to supplement his declaration. Thereafter, father filed a second declaration wherein he contested the earlier finding that mother "had been . . . the primary custodian," calling it a "false assumption" which should be corrected by modifying the custody order. Father also set forth reasons for his disagreement with mother's decision to send the child to private school rather than public school. In addition, he declared the parties' ability to communicate had begun to improve up to the time mother learned father intended to seek a modification of the custody order. Mother filed a responsive declaration addressing these points.

After reviewing the documents filed by both parties, including a transcript of the hearing before the judge who issued the prior custody order, the court found the prior order "was a final order regarding custody and visitation." The court further found father had not met his burden to show "any change of circumstance to alter the current custody/visitation [arrangement]." The court also ordered the parties to attend weekly counseling sessions for six months so that they may "be able to communicate again . . . ."

DISCUSSION

Father argues the court erred in finding the May 2002 custody order was a final ruling and in finding that he failed to meet his burden to show changed circumstances warranting modification of that order. We disagree.

A judicially determined custody order may only be modified if the parent seeking modification "demonstrate[s] 'a significant change of circumstances' . . . . [Citations.]" (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 950; see also *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 [changed circumstance rule applies when custody of child was established by judicial decree].) The custody order in this case was judicially determined and, therefore, final in the sense that changed circumstances had to be shown to modify it. Moreover, having reviewed the order itself and the transcript of the related hearing, we find nothing to support father's contention that the order was intended to be temporary.

Citing *In re Marriage of Jacobs* (1980) 102 Cal.App.3d 990, father argues "there has been a failure of the underlying assumption . . . that [mother] had been the primary parent for [the child]." But he waived his right to challenge the court's finding that mother had been the primary caretaker by failing to timely appeal from the May 2002 custody order. Furthermore, *In re Marriage of Jacobs* involved a spousal support order based upon an assumption that the wife would be self-supporting after 18 months; that assumption failed due to the wife's ongoing psychiatric problems. The court held that the failure of that assumption constituted a significant change in circumstances and the request to modify the spousal support order should have been granted. (*Id*. at pp. 992-993.) Here, in contrast, in issuing the custody order, the court made a specific finding, not a mere assumption, that mother had been the primary caretaker. Pursuant to that finding, mother was awarded primary physical custody of the child.

The court did not err by refusing to redetermine a factual issue underlying the custody order itself. "Once a trial court has determined that a particular child custody and visitation arrangement is in the best interests of the [child], '"the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest." [Citation.]' [Citation.]" (*In re Marriage of*

Campos (2003) 108 Cal.App.4th 839, 843.) Consequently, father's sole option was to seek modification of the custody order by showing a significant change in circumstances.

We review the order denying father's request to modify the custody order for abuse of discretion. (*Montenegro v. Diaz, supra,* 26 Cal.4th at p. 255; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) "[A]s with any allegation that 'changed circumstances' warrant a modification of an existing custody order, the noncustodial parent has a substantial burden to show that '"some significant change in circumstances indicates that a different arrangement would be in the child's best interest." [Citation.]' [Citation.] The changed circumstance rule provides 'that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements. [Citations.]' [Citation.]" (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088.)

We discern no abuse of discretion in the court's finding that father did not meet his burden of showing a significant change in circumstances. Father showed he moved to within two and a half miles of mother's home. He also asserted he disagreed with mother's "unilateral[]" decision to have the child attend kindergarten at a private school close to her home. Instead, father wanted the child to attend the same public school the children of his live-in girlfriend attended. Father declared that he would be able to provide transportation to the school and help the child with her homework.

Mother countered that she had "made several attempts to discuss Kindergarten with [father] . . . but he refused to discuss the issue." Mother explained why she chose to send the child to private school and declared that the public school father would like the child to attend was not as conveniently located. She further declared, "[father] refuses to communicate . . . . He consistently hangs up on me or walks

away from me in the middle of something important regarding our daughter that I am trying to communicate to him."

The decision to award primary physical custody of the child to mother was largely based on the parties' inability to "effectively and consistently communicate with each other concerning the welfare and best interests of their minor child . . . ." The fact that father had moved closer to mother's residence and could transport the child to a school he preferred over the one mother had chosen did not constitute a significant change in circumstances indicating a different arrangement would be in the child's best interest. Rather, the parties' declarations showed a continuing inability to communicate effectively about matters concerning the child's welfare. Thus, father did not show it was "'essential or expedient for the welfare of the child'" to modify the custody order. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.)

DISPOSITION

The postjudgment order is affirmed. Respondent is awarded costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.